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In the Supreme Court

of the United States

OCTOBER TERM, 1975

No. 75-365

WALTER E. WINKELMAN and PAUL F. BECKER,

Petitioners,

v.

BLYTH & CO., INC., a Delaware corporation,

Respondent.

ELMER G. ANDERSON and VICTORIA G. ANDERSON, husband and wife, THELMA SCOTT WOOD, MAURICE J. SCOTT and MARGARET M. SCOTT, husband and wife, ABBOTT W. LAWRENCE and EDITH R. LAWRENCE, husband and wife,

Petitioners,

v.

BLYTH EASTMAN DILLON & CO., (BLYTH & CO., INC.), a Delaware corporation, THOMAS MORRIS and JOHN VAN LANINGHAM,

Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RESPONDENTS' BRIEF OPPOSING PETITION FOR A FOR A WRIT OF CERTIORARI

Respondents urge that the petition for writ of certiorari be denied.

The District Court correctly held[1] that the Oregon two-year statute of limitations for fraud actions applies to private civil damage actions under Rule 10b-5;[2] that, under the federal doctrine of equitable tolling, the two-year period commenced when the plaintiffs knew or reasonably should have suspected the alleged fraud; and that the adverse factors about their investment set forth in a letter to them dated June 12, 1969 started the two-year limitations period, thereby barring their claims filed three and three years nine months later.

The Ninth Circuit unanimously affirmed based on the District Court's opinion.[3]

The District Court was also correct in denying plaintiffs' motion to have the Winkelman-Becker case treated as a class action under Fed. R. Civ. P. 23.[4] It properly held that a class action would not be a superior method of adjudication because non-standard oral misrepresentations formed the basis of the alleged fraud, and that common questions of law and fact would not predominate.

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[1] *Winkelman* v. *Blyth & Co., Inc.*, (D. Or. 1973) 394 F. Supp. 994.

[2] 17 C.F.R. 240.10b-5.

[3] *Winkelman* v. *Blyth & Co., Inc.*, (9 Cir. 1975) 518 F.2d 530, reh. den. July 11, 1975.

[4] R. 133. The Order is reproduced at p. A-13 of the Petition.

The Ninth Circuit's affirmance of the District Court's Order granting summary judgment against petitioners made moot the Winkelman-Becker contentions concerning the District Court's denial of class treatment.

STATEMENT OF THE CASE

Petitioners separately purchased stock of Aseco, Inc. (Aseco) from respondent Blyth & Co., Inc. (Blyth) over a period from June 25, 1968 to March 5, 1969 at prices ranging from $29.50 to $88.00 per share.[5] Their complaints recite that they were induced to make the purchases by reason of respondents' alleged misrepresentations about the financial and operating condition of Aseco, i.e., that Aseco stock was investment grade and would rise in price in a short time, and that Aseco was a viable company with a good outlook for the future and soon would be a party to a favorable merger with Whale, Inc. (Whale).[6]

On June 12, 1969, Aseco sent to plaintiffs and other shareholders a letter which set out numerous adverse factors about Aseco, including *inter alia* that the merger with Whale would not be consummated, the company had lost all of the contracts which produced 100% of its income during the year ended February 28, 1969, four of the five plants were idle with sales of equipment and facilities contemplated, the company had been unable to locate new business, cur-

[5] R. 2, 135, 136, 150.
[6] 394 F. Supp. at 995.

rent operating losses would continue unless new business was found, the company was attempting to defer payment of long-term indebtedness, the book value of the stock was about $5.00 per share, and there had been recent changes of management and litigation filed by former officers and directors.[7] The disastrous condition of Aseco was confirmed in subsequent mailings to stockholders in August, 1969.[8]

Winkelman and Becker filed their complaint on June 13, 1972 (R. 1). Their motion to have the case treated as a class action pursuant to Fed. R. Civ. P. 23 was denied on December 21, 1972 because:

> "It appears that, in this action, a class action is not superior to other available methods for fair and efficient adjudication in that there appear to be non-standard oral misrepresentations that form the basis of the alleged fraud, and common questions of law and fact do not predominate." (R. 133).

On March 8, 1973, Anderson and the other petitioners filed their complaint.[9]

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[7] Id. at 995-996. The text of the letter is reproduced at pp. A-22-29 of the Petition.

[8] 394 F. Supp. at 996.

[9] The Anderson complaint did not seek class treatment under Rule 23.

OPINIONS BELOW

The District Court granted respondents' motion for summary judgment pursuant to Fed. R. Civ. P. 56. It first found the facts as stated above with respect to the nature of petitioners' allegations and the adverse information in the June 12, 1969 letter showing the "disastrous condition" of Aseco. It then held that the Oregon two-year limitation period for commencing fraud actions applied, subject to the proviso that the period commences either upon actual discovery of the fraud, or at such time as a reasonably prudent person, similarly situated, should have discovered the fraud.[10] It then concluded:

> "The knowledge had by or imputed to the plaintiffs [petitioners] from the June 12, 1969 letter to the stockholders compels the conclusion that a prudent man would have suspected the alleged fraud. There is no genuine issue as to this material fact." (394 F. Supp. at 996).

Because the earlier complaint was filed three years

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[10] 394 F. Supp. 996. At the time of that decision, no opinion of the Ninth Circuit had passed on the statute of limitations applicable to Rule 10b-5 actions arising in Oregon. The Ninth Circuit, however, had consistently held that the local statute of limitations relating to fraud actions applied to Rule 10b-5 cases arising in Washington and Caliornia. *Fratt* v. *Robinson*, (9 Cir. 1953) 203 F.2d 627, 634 (Washington); *Errion* v. *Connell*, (9 Cir. 1956) 236 F.2d 447, 455 (Washington); *Turner* v. *Lundquist*, (9 Cir. 1967) 377 F.2d 44, 46 (California); *Sackett* v. *Beaman*, (9 Cir. 1968) 399 F.2d 884, 890 (California); *Hecht* v. *Harris, Upham & Co.*, (9 Cir. 1970) 430 F.2d 1202, 1210 (California); *Douglass* v. *Glenn E. Hinton Investments, Inc.*, (9 Cir. 1971) 440 F.2d 912, 915-916 (Washington); *United California Bank* v. *Salik*, (9 Cir. 1973) 481 F.2d 1012, 1014-1015 (California).

after the June 12, 1969 letter, all of petitioners' claims were barred.

The Ninth Circuit unanimously affirmed. 518 F.2d at 531.

REASONS FOR DENYING THE PETITION

Both Lower Courts Correctly Applied the Federal Doctrine of Equitable Tolling to the Uncontested Facts

Petitioners concede that Aseco mailed the June 12, 1969 letter to its stockholders,[11] that petitioners were stockholders when it was sent, [12] that the price of Aseco declined sharply after petitioners' purchases,[13] that an Oregon statute of limitations applies to their Rule 10b-5 claims,[14] and that both lower courts applied the federal doctrine of equitable tolling in determining when the two-year limitations period for fraud actions in Oregon commenced to run.[15]

Petitioners contend that the lower courts did not correctly apply the equitable tolling doctrine to the uncontested facts. They advance three reasons. None warrants the granting of a writ of certiorari.

First, petitioners contend that the District Court's adoption of a "prudent man" standard for imputing discovery by petitioners was improper. The cases are

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[11] Petition 6, 7. See R. 162.
[12] R. 2, 135-136, 150, 234.
[13] Petition 3, 10, 12, 13.
[14] Petition 16.
[15] Petition 2, 9-13.

to the contrary. *Bailey* v. *Glover*, (1875) 88 U.S. (21 Wall) 342, which is the fountainhead of federal tolling, states that lack of negligence by a plaintiff is a condition precedent to his right to claim the benefits of tolling:

> ". . . we hold that *when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit* and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to the party suing, or those in privity with him." (88 U.S. at 350; emphasis added).

Mere knowledge of a sharp decline in the price of a stock is sufficient notice where the investor allegedly bought in reliance upon a broker's statement that the price would rise. *Hupp* v. *Gray*, (7 Cir. 1974) 500 F.2d 993, 996-997. Awareness of additional facts showing the company's inability to generate profits is also sufficient notice. *Turner* v. *Lundquist*, (9 Cir. 1967) 377 F.2d 44, 47-48.

Petitioners are correct that proof of their actual awareness of facts pointing to fraud would prevent them from claiming the benefits of tolling. But their contention that an objective test can never apply would nullify the statute of limitations, a result rejected by *Bailey*, *Hupp* and *Turner*, supra.

Second, petitioners contend that awareness of facts pointing to one violation of the securities laws would not start the limitations period as to other violations.

That proposition misstates the rule in *Schillner* v. *H. Vaughan Clarke & Co.*, (2 Cir. 1943) 134 F.2d 875, 878:

> ". . . Even if it be assumed that the action was barred in so far as it was based on a misrepresentation as to dividends, this would not preclude recovery on the ground of *some other untruth or material omission which reasonable diligence would not have discovered before the critical date. . . .*" (Emphasis added).

Accord: White v. *Federal Deposit Ins. Corporation*, (4 Cir. 1941) 122 F.2d 770, 775; *Wood* v. *Baker*, (1959) 217 Or. 279, 287.

The District Court properly focused on facts known or knowable by petitioners more than two years before their complaints were filed, and concluded that petitioners should have known that respondents' alleged statements about the worth of their investment were false. Clearly its conclusion is consistent with the reasonable diligence rule in *Schillner*, *White* and *Wood*, supra.

Third, petitioners contend that summary judgment was inappropriate. The thrust of that contention is to nullify Fed. R. Civ. P. 56. While summary judgment is not appropriate if conflicting inferences may be drawn from the evidence before the court, *United States* v. *Diebold*, (1962) 369 U.S. 654, 655, it is appropriate where the inferences all point to the unreliability of the statements by respondents which

induced petitioners to buy the stock. *Hupp* and *Lundquist*, supra.[16]

The District Court Correctly Denied Petitioners' Motion for Class Action Treatment

The class action issue is moot because petitioners' claims are barred by the statute of limitations. A person without standing cannot be a proper representative of any class. *Mintz* v. *Mathers Fund, Inc.*, (7 Cir. 1972) 463 F.2d 495; *Kauffman* v. *Dreyfus Fund, Inc.*, (3 Cir. 1970) 434 F.2d 727, 734, cert. den. (1971) 401 U.S. 974. Furthermore, each purported class member would be barred in his own right by the statute of limitations.

Nor have petitioners advanced reasons establishing that the District Court abused its discretion in denying class treatment. Petitioners' motion was predicated on Fed. R. Civ. P. 23(b)(3). R. 17-37. Two of the indispensable requirements of that rule are that common questions of law or fact predominate over individual questions, and that class treatment be the superior method of adjudication, after considering the practical difficulties in managing a class action and

[16] Petitioners' claim that Blyth was a market maker is contrary to the undisputed record. Morris Affidavit, R. 88. Moreover, market making is material only in the context of the statements which induced petitioners to buy the stock. *Winkelman*, supra, 518 F.2d at 531. Notice of the unreliability of those statements charged petitioners with the duty to inquire about the circumstances making those statements unreliable.

other factors. The core of petitioners' complaint is an alleged "misleading stream of information" about Aseco, made in the context of oral discussions between the investor and his sales representative.[17] R. 4, 63. Neither petitioners nor the other investors they sought to represent could escape having to testify about the statements made to them about Aseco. Otherwise the trier would have no basis to determine whether the material facts alleged by petitioners were misstated or omitted. Nor would the trier have any basis to decide if petitioners did or did not rely or otherwise suffer harm as a result of the alleged wrongs. The District Court properly concluded that common questions would not predominate and that the practical difficulties of trying each claim foreclosed a finding of superiority. R. 133. *Accord: Morris* v. *Burchard*, (S.D. N.Y. 1971) 51 F.R.D. 530, 535; *Simon* v. *Merrill Lynch, Pierce, Fenner & Smith*, (5 Cir. 1973) 482 F.2d 880, 882-883.

Rule 23 contemplates that the trial judge, who is best able to assess the practical difficulties of trying a class action, has broad discretion in determining the appropriateness of class treatment. On review, his decision is entitled to the greatest respect. *City of New York* v. *International Pipe & Ceramics Corp.*, (2 Cir. 1969) 410 F.2d 295, 298. In the case at bar, the District Court fully and fairly canvassed the factual aspects and concluded that class treatment would not be appropriate. Petitioners' contentions that

[17] There was no prospectus or other writing received by petitioners prior to their purchases.

certain aspects of the alleged wrongs might involve similar proof, e.g., Blyth's purported self-interest in selling the stock or its relationship with activities of another broker-dealer, do not override the trial judge's determination that disposition of the claims as a whole would preclude commonality and superiority.

The Oregon Statute of Limitations for Fraud Actions is the Correct Statute of Limitations for Petitioners' Rule 10b-5 Claims

Petitioners' final contention is that the three-year limitation period of the Oregon blue sky statute (ORS 59.115(5)) should have been applied, rather than the two-year fraud statute (ORS 12.110(1)). They concede that an appropriate Oregon statute must be used.[18]

Since 1953 (*Fratt*, supra) the Ninth Circuit has stated its preference for the local fraud statute. It bases its preference on the grounds that securities fraud actions are closely akin to common law fraud actions and that state legislatures have incorporated tolling until "discovery." ORS 12.110(1) incorporates tolling:

> ". . . the limitation shall be deemed to commence only from the discovery of the fraud or deceit."

ORS 59.115(5) does not:

> "(5) No action or suit may be commenced

[18] The Securities Exchange Act of 1934, 15 U.S.C. §§ 78a et seq., does not prescribe a limitations period for federal civil damage actions.

under this section more than three years after the sale."[19]

The Ninth Circuit's consistent reaffirmation of its preference[20] gives certainty of application to all Rule 10b-5 actions arising in states within that Circuit.

Petitioners' laborious citation of cases from other Circuits does not establish any "conflict" which requires resolution by this Court. Congress has left to the lower courts the task of deciding which state statute of limitations is most appropriate for actions arising in that state. The fact that decisions from other states and Circuits adopt a statute other than the fraud statute merely reflects the court's assessment of the proper statute *for that state*, based on the choices prescribed by the legislature of that state. Thus, uniformity of results and certainty of application do prevail; petitioners have not shown otherwise.[21]

While the foregoing disposes of petitioners' contention that the pendency of the Winkelman-Becker class allegations from June 13, 1969 to December 21, 1969 tolled the limitations period as to Anderson et

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[19] Petitioners' claims are barred under ORS 59.115(5). *Winkelman*, supra, 394 F. Supp. at 996. Petitioners do not challenge that holding in this appeal.

[20] See Fn. 10, supra.

[21] Petitioners do not contend that the statute of another state applies in the case at bar. Even if that were the case, the District Court could resolve the question under familiar conflicts of laws rules.

al., that tolling cannot help the latter. They are charged with three years from the June 12, 1969 letter to the filing of the Winkelman-Becker complaint, and an additional two and one-half months from the denial of the Winkelman-Becker class motion (December 21, 1969) to the filing of their complaint (March 8, 1973).

CONCLUSION

Respondents pray that the petition be denied.

Respectfully submitted,

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